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No. 03-1500

In The
Supreme Court of the United States

Thomas Van Orden,
Petitioner,

v.

Rick Perry, et al.,
Respondents.

On Writ of Certiorari
To the United States Court of Appeals
For Fifth Circuit

Brief of Baptist Joint Committee and The Interfaith Alliance Foundation as Amici Curiae in Support of Petitioner

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QUESTION PRESENTED

Whether government display of a sacred text is subject to a presumption of unconstitutionality, rebuttable only by objective evidence, visible at the site of the display, that clearly negates the appearance that the government endorses what it displays.

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INTEREST OF THE AMICI

The amici joining in this brief are Christian or interfaith religious organizations. These amici are concerned about the religious liberty of all persons, *and* about government undermining true religious faith by using religion for political purposes. This case is one of many in which government displays a sacred text, and then distorts that text and diminishes its religious significance by claiming that the text is primarily secular in purpose and effect.

The Baptist Joint Committee is a religious liberty organization serving fourteen cooperating Baptist conventions and conferences in the United States. The BJC deals exclusively with religious liberty and church-state separation issues and believes that vigorous enforcement of both the Establishment and Free Exercise Clauses is essential to religious liberty for all Americans.

The Interfaith Alliance Foundation is a unit of the Interfaith Alliance, an interfaith group of 150,000 people of faith and goodwill, from seventy different faith groups, working to promote interfaith cooperation around shared religious values and to strengthen the public's commitment to the American values of civic participation, freedom of religion, diversity, and civility in public discourse. This brief is filed with consent of all parties.[1]

SUMMARY OF ARGUMENT

When government displays a sacred text, it must be presumed to endorse that text. This presumption should be rebuttable only by equally prominent evidence at the site of the display that objectively negates the appearance of

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[1] This brief was prepared entirely by counsel for amici. No person other than amici and their counsel made any financial contribution to the preparation or submission of this brief. Petitioner's consent is on file with the Clerk; Respondent's consent is submitted with the brief.

endorsement. Such a presumption is implicit in this Court's earlier cases; it should be made explicit.

The lower courts' failure to insist on clear and objective evidence has led to much litigation over attenuated claims of secular purposes and secular effects for displays that are clearly religious. The result is a persistent pattern of high-profile litigation in which government desacralizes sacred texts, distorting and undermining the text's religious meaning in its effort to demonstrate secular meanings.

Many of the alleged secular purposes and effects in these cases are shams. In this case, the secular purposes and effects alleged in this case are clearly insufficient to negate the state's explicit endorsement of the religious text. The alleged secular purpose to honor the Fraternal Order of Eagles is not explicitly stated at the site of the display, is not known to the reasonable observer, and is entirely consistent with a purpose to also endorse the Commandments.

The alleged secular effect of demonstrating the Commandments' important role in the development of American law is not explicitly stated at the site of the display, is not known to the reasonable observer, and depends on a premise that is demonstrably false. The Commandments have not had a significant secular role in the development of American law. Most of the Commandments are not part of American law at all, and those that are part of American law were part of Anglo-Saxon law long before the Anglo-Saxons learned of the Commandments. As a statement of the numerically dominant religious traditions in the country, the Commandments lend moral and religious support to parallel legal provisions. But this is a religious function, not a legal one.

Most of the circumstances that might rebut the presumption of endorsement can be specified in advance. Some displays of sacred texts may be integral parts of a larger message that is neutral with respect to the religious content of the sacred text, as in objective educational materials and museum displays. Certain ceremonial uses of

very short sacred texts might fit within Justice O'Connor's test for identifying secular uses of religious language, set forth in *Elk Grove Unified School District v. Newdow*, 124 S. Ct. 2301, 2323-27 (2004) (O'Connor, J., concurring). Some short quotations, taken from religious sources but lacking expressly religious content, may serve as eloquent statements of ideas that are secular as well as religious. Other unusual circumstances may arise, but there are few plausible secular reasons for displaying sacred texts.

ARGUMENT

I. This Court Can and Should Provide a More Objective Definition of "Endorsement" for Cases Where Government Displays a Sacred Text.

A. Government Display of a Sacred Text Endorses That Text, Unless the Government Visibly and Objectively Negates That Endorsement.

At issue in this case is a state's freestanding display of a sacred text at the seat of government. Such a display necessarily endorses the religious message of the text displayed -- unless the state takes clear affirmative steps to negate that endorsement or unless some other unusual circumstance, apparent to the reasonable observer of the display, negates any endorsement of the religious message.

It is of course rare for any person to erect a sign to display a message with which he disagrees. Rather, the most obvious and most common reason to display a text is to more widely disseminate the message expressed in that text, so that people who read the displayed text will believe what it says, or act on what it says, or at the very least, reflect on what it says. This is true of ordinary signs bearing secular texts, and it is equally true of formal monuments bearing sacred texts.

Even if a textual display is owned by a person with some unusual secret intention, a reasonable observer of the display has no way to know that. The observer can infer only that the display's owner intended readers to believe the stated message. As an ordinary matter of fact, display of a sacred text emphatically endorses the message in that text.

This commonplace factual inference should support a legal presumption: government display of a sacred text presumptively endorses the religious message in that text, and the burden is on government to clearly rebut the presumption of endorsement with objective evidence visible to the reasonable observer. In this and similar cases, the endorsement of the displayed text is open, obvious, and difficult to plausibly deny. The evidence that overcomes that impression of endorsement must therefore be equally open and obvious, and it must be strong enough to objectively outweigh the message of endorsement.

Structuring the endorsement test in this way is fully consistent with this Court's prior cases. This Court has never accepted a claim that government can sponsor a religious message composed of words without appearing to endorse that message.[2] The only arguable exception is *Marsh v. Chambers*, 463 U.S. 783 (1983), upholding legislative prayers, but that case was decided on the basis of a unique tradition giving rise to a unique exception to the usual rules; the opinion did not even discuss the Court's usual tests for Establishment Clause cases.

In *Stone v. Graham*, 449 U.S. 39 (1980), the only prior case involving a passive textual display, the Court flatly rejected the state's claim of a secular purpose for displaying a sacred text. The Court viewed the sacred text as speaking for itself and declaring its own purpose and

[2] *See Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000); *Lee v. Weisman*, 505 U.S. 577 (1992); *Treen v. Karen B.*, 455 U.S. 913 (1982); *Stone v. Graham*, 449 U.S. 39 (1980); *Sch. Dist. v. Schempp*, 374 U.S. 203 (1963); *Engel v. Vitale*, 370 U.S. 421 (1962).

effect, *see id.* at 41, just as the prayers and Bible readings had spoken for themselves in the school prayer cases, *see id.* & n.3. And the Court noted that "this is not a case in which the Ten Commandments are integrated into the school curriculum, where the Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like." *Id.* at 42. Such "integrat[ion]" into a larger secular message is the principal case in which a sacred text might plausibly be displayed for secular reasons. We urge the Court to make explicit what is implicit in *Stone* and other cases: when government displays a sacred text, it presumptively endorses that text, and government has the burden to rebut that presumption with objective evidence of an explicit secular message that clearly negates the appearance of endorsement.[3]

B. Unstructured Factual Inquiry into Government Purpose and Effect Invites Sham Litigation That Desacralizes Sacred Texts.

The courts below did not presume, either legally or factually, that government endorses what it displays.

[3] Displays consisting principally of symbols other than words may support a somewhat weaker presumption of endorsement. *Compare County of Allegheny v. ACLU*, 492 U.S. 573 (1989) (invalidating creche displayed by itself, but upholding menorah displayed with Christmas tree and salute-to-liberty sign); *with Lynch v. Donnelly*, 465 U.S. 668 (1984) (upholding creche displayed with reindeer, wishing well, and the like). In the cases where religious symbols were upheld, religious symbols were mixed with symbols the Court viewed as secular. More fundamentally, the implicit statements of nonverbal symbols are more open to interpretation than express statements in words. A display of two tablets, symbolically representing the Commandments but not displaying their text, would thus present a much closer question than display of the sacred text. *See King v. Richmond County*, 331 F.3d 1271 (11th Cir. 2003) (upholding such a display in a county seal).

Consequently, they did not require government to take clear steps to objectively negate the appearance of endorsement.

The opinions below reveal an essentially unstructured factual inquiry into the purpose and effect of religious conduct by government. Unfortunately, this is a common approach to the endorsement test. The resulting litigation invites government to proffer implausible claims of secular purposes and secular effects for even the most obviously religious practices and displays. Sometimes these proffered purposes and effects are shams; sometimes they are hoped-for benefits of readers attending to the religious message. Federal judges are understandably reluctant to accuse state and local governments of bad faith, so even sham claims of secular purpose and effect are taken seriously, solemnly litigated, and solemnly adjudicated.

Most courts of appeals have properly invalidated freestanding displays of the Ten Commandments.[4] But each of these cases required an individualized and fact-intensive trial at which plaintiffs were required to refute implausible claims of secular purpose and effect. And occasionally, sympathetic judges actually accept government claims of secular purposes and effects for sacred texts. Judges sympathetic to government sponsorship of religion, not perceiving any objective rule from this Court, conclude that some religious displays are permitted, and so the implausible findings necessary to uphold such displays must be permitted as well. In this case, the courts below found a secular purpose and secular effect, with only the vaguest allusions to the intensely religious content of the display.

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[4] *See ACLU Neb. Found. v. City of Plattsmouth*, 358 F.3d 1020 (8th Cir. 2004), *vacated & reh'g en banc granted*, No. 02-2444 (8th Cir., Apr. 6, 2004); *ACLU v. McCreary County*, 354 F.3d 438 (6th Cir. 2003), *cert. granted*, 125 S.Ct. 310 (2004); *Glassroth v. Moore*, 335 F.3d 1282 (11th Cir. 2003), *cert. denied*, 540 U.S. 1000 (2003); *Ind. Civil Liberties Union v. O'Bannon*, 259 F.3d 766 (7th Cir. 2001).

The content of the display in this case is indisputably, and profoundly, religious. The displayed text begins:

the Ten Commandments

I AM the LORD thy God.

Thou shalt have no other gods before me. Thou shalt not make to thyself any graven images.

Thou shalt not take the Name of the Lord thy God in vain.

Remember the Sabbath day, to keep it holy.

Honor thy father and thy mother that thy days may be long upon the land which the Lord thy God giveth thee.

The first two lines are centered and in larger type, approximately as shown here. One cannot learn any of these facts from the opinion below -- neither the words of the display nor the words and lines that get greater emphasis. Unable to explain how these facts fit with its conclusion that a reasonable observer would perceive the display as secular, the Court of Appeals ignored the display's actual content.

Structuring the litigation in this way demeans the religious teachings that governments set out to endorse. Time after time, in litigation that is nearly always highly publicized, government minimizes the religious significance of government-sponsored religious practices or displays. Government insists that sacred texts are really primarily secular in their meaning, or that they have been displayed primarily for secular purposes and have primarily secular effects. In this process, government lends its weight to distorted readings of sacred texts; indeed, government litigators deliberately desacralize these sacred texts. Secular readings of the text are promoted; the religious understanding of the faith groups to whom the text is sacred are deemphasized or ignored.

In the Ten Commandments cases, the Commandments with secular equivalents get emphasized -- and ripped from

context. The Court of Appeals repeatedly asserted that the Commandments are both religious and secular. *See Van Orden v. Perry*, 351 F.3d 173, 179, 180, 180 n.15, 182 (twice) (5th Cir. 2003). But this repeated claim is not true.

Some of the Commandments have secular equivalents:

> Thou shalt not kill.
> Thou shalt not commit adultery.
> Thou shalt not steal.
> Thou shalt not bear false witness against thy neighbor.
> That shalt not covet thy neighbor's house.
> Thou shalt not covet thy neighbor's wife, nor his manservant, nor his maidservant, nor his cattle, nor anything that is thy neighbors.

In isolation, this "Second Table" might be understood as both religious and secular. But there is no secular equivalent to the "First Table," quoted on the preceding page. The introductory sentence is an unequivocal claim that these Commandments are the direct Word of God. The first two Commandments in this listing[5] are exclusively about the believer's relationship to God. This is equally true of the Third Commandment in this listing: there may be a secular norm of weekly rest and relaxation, or of giving workers a day off, but there can be no secular equivalent to an obligation to keep a day "holy." "Holy" is an inherently religious concept. And while there should be a secular norm of honoring one's parents, there can be no secular equivalent to the promise of divine reward attached to the performance of that Commandment. The First Table is **not** both religious and secular; it is exclusively religious.

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[5] As explained in Petitioner's Brief, there are multiple versions of the Commandments and multiple ways of numbering them. In many traditions, the Commandment against graven images is listed separately as the Second Commandment. We have listed and numbered the Commandments as they appear on the monument at issue in this case.

The two Tables of the Commandments are a unified whole, and Texas displays them as such. So even "Thou shalt not kill" is not a mere statement of secular ethics, or of Texas law; Christians and Jews believe it to be a direct command from God, personally delivered to Moses on Mt. Sinai. And of course the *religious* meaning of these Commandments only approximately corresponds to the *legal* meaning of modern prohibitions.

Lawyers and judges bent on upholding government displays of the Commandments necessarily ignore the Commandments with no secular equivalent, and necessarily ignore the origin and context of all the Commandments. Government efforts to endorse religious teachings, and the judiciary's deference to government rationalizations of those endorsements, do significant harm to what is constitutionally protected -- the private efforts of each faith tradition to teach its own sacred texts and its own understanding of those texts.

The unstructured way in which lower courts have applied the endorsement test also creates confusion among those charged with teaching about religion in the public schools. Some schools suppress objective teaching of social or historical facts about religion -- teaching that is both constitutionally permissible and pedagogically essential to any accurate understanding of American history. The press is currently covering a dispute in which a California history teacher claims that he has been forbidden to give the Declaration of Independence to his students, because the Declaration attributes our "unalienable rights" to our "Creator."[6] Numerous recent stories reported on schools that were allegedly teaching the story of the Pilgrims and the first Thanksgiving without mentioning who it was that the Pilgrims believed themselves to be thanking.[7] Subjective

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[6] *See* Dean E. Murphy, *God, American History and a Fifth-Grade Class*, N.Y. Times, Dec. 5, 2004.

[7] *See, e.g.*, Steve Chapman, *Schools, God and Thanksgiving*,

case-by-case judgments create uncertainty. Activists on both ends of the religious and political spectrum exploit that uncertainty to make sham or exaggerated claims, and cautious school officials conclude that the only safe course is to avoid the whole topic. The Court could reduce this uncertainty by adopting the proposed presumption and more clearly stating what is sufficient to rebut the presumption.

If the Court decides this case and its companion on the basis of a fact-intensive inquiry into the two individual displays, it will encourage further endless litigation about every such display in the country, and then about all the changes and additions that the sponsors of such displays might make to change the facts and require renewed litigation. We believe that this Court can give better guidance in these cases. The Court should announce a presumptive rule, and it should require readily visible and objective evidence to overcome that presumption. The Court can even identify in advance most of the legitimate uses of sacred texts that would rebut the presumption. The resulting rule would be much clearer and more workable.

II. The Courts Below Relied on Evidence That Is Plainly Insufficient to Negate Texas's Explicit Endorsement of the Ten Commandments.

The religious message of the Ten Commandments is explicit and obvious. The apparent purpose to endorse that message, and the actual effect of endorsing that message, are immediately visible to any reasonable observer. For this endorsement to be credibly negated, other content in the challenged display must transmit a different message so clearly and strongly that it negates the usual message of

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Chicago Tribune, Nov. 25, 2004, available at 2004 WL 100740817; Laurel Lundstrom, *Religion Kept Out of Thanksgiving Stories*, (Annapolis) Capital News Service, Nov. 22, 2004, available at http://www.hometownannapolis.com/vault/cgi-bin/protect/view/2004/11/22-39.htm.

endorsement. The presumption that the state endorses what it displays should be rebuttable only by objective evidence visible to the reasonable observer at the site of the display. It should not be rebuttable by the oral testimony of government officials claiming private intentions, or by historic claims buried in the archives. It should not be rebuttable by claims of subtle secular messages that can be ferreted out only with effort that exceeds what is required to see the explicit message on the face of the display. When courts entertain evidence of offsite explanations or subtly implied secular messages, they invite sham claims of secular purpose and effect.

There is nothing in this case to rebut the explicit endorsement that appears on the face of the monument. The display is given no meaningful context independent of the sacred text itself. In that sense, the religious display is gratuitous -- not explained by, or plausibly motivated by, anything apart from the religious teaching embodied in the displayed text. To a reasonable observer who comes upon this display -- no matter how sophisticated the observer -- the only perceptible effect of the display, and the only imaginable purpose for the display, is to endorse the religious teachings thus displayed. Such an endorsement is clearly unconstitutional under this Court's cases.

The rationalizations offered by Texas in this case, and accepted by the courts below, are not clear, visible, and objective. Rather, they are weak, hidden, and inconsistent. They are plainly insufficient to overcome the clear message of endorsement naturally created by the state's display.

A. The Alleged Secular Purpose.

The Court of Appeals found a secular purpose "to recognize and commend a private organization [the Fraternal Order of Eagles] for its efforts to reduce juvenile delinquency." 351 F.3d at 178. But the Court of Appeals did *not* find that the monument achieves this purpose. It did *not* find a secular *effect* of honoring the Eagles, for the

obvious reason that the monument says nothing about this purpose. The monument states that the Eagles "presented" the monument, but it does not mention their work on juvenile delinquency and it says nothing about the state's opinion of the Eagles. The purpose to honor the Eagles was recited in a 1961 legislative resolution, a resolution wholly invisible to reasonable observers and forgotten by everyone until discovered in the research for this case.

We of course do not suggest that as a general matter the state can act only for publicly stated purposes, even in the context of the Establishment Clause. Rather, we suggest that when the state acts in a way that is openly and explicitly religious, thus triggering a presumption of religious endorsement, and then claims to have had a secular purpose, the credibility of its claimed purpose may depend on having made that purpose publicly visible in a credible way.

Even if unknown purposes are entitled to some weight in cases of presumptive endorsement, the alleged purpose to honor the Eagles does not negate a purpose to endorse the displayed text. Plainly Texas could endorse both the Eagles and the Ten Commandments. If the Eagles had offered a monument displaying text with which the legislature disagreed, the legislature would not have accepted the monument -- no matter how much it wanted to honor the Eagles. The Capitol grounds in Texas are not a forum open to any private organization that wishes to erect a permanent monument. The legislature chooses what monuments to accept, and each of the seventeen monuments displays a message that the legislature endorsed, at least at the time of acceptance.[8] And like any other actor, the legislature intends the natural consequences of its acts. It had a purpose

[8] We will not speculate on whether today's legislature still endorses everything said on the various monuments to Confederate soldiers. But even if the state's political sentiments have changed over time with respect to those monuments, there is no evidence of any similar change in majority views with respect to the Ten Commandments.

to disseminate the Ten Commandments on the Capitol grounds, even if it also had a purpose to honor the Eagles.

Judged by the objective test of what the legislature purposely did, the purpose to endorse the Ten Commandments predominated. The legislature permanently and publicly displayed the text of the Ten Commandments; it honored the Eagles only in passing, taking no steps to give that purpose anything remotely approaching the permanent prominence it gave the sacred text.

The purpose requirement is not satisfied "by the mere existence of some secular purpose, however dominated by religious purposes." *Lynch v. Donnelly*, 465 U.S. 668, 691 (1984) (O'Connor, J., concurring). The example cited to illustrate this point was *Stone v. Graham*, 449 U.S. 39 (1980), where the Court held that "no legislative recital of a supposed secular purpose can blind us to th[e] fact" that "[t]he Ten Commandments are undeniably a sacred text." *Id.* at 41. To display a sacred text is to endorse that text.

Another striking and erroneous feature of the opinion below is the extent to which it placed on plaintiff the burden of proving religious purpose by evidence *other than* the state's religious conduct in displaying the sacred text. The Court of Appeals repeatedly emphasized that "there is no evidence of any religious invocations" or of clergy in attendance at the dedication ceremony in 1961, 351 F.3d at 179, and that there was no evidence of religious purpose "in the events attending the monument's installation," *id.* The court also said that "there was no religious service attending the acceptance of the monument in Texas," *id.*, by which it could only mean that there was *no evidence* of a religious service. In fact, the record tells us almost nothing about the installation ceremony. Given the content of the monument and social customs in Texas, it is highly likely that there were prayers at the installation. But there is no way to know. The lack of evidence is not surprising after more than forty years, and we are not suggesting that evidence was deliberately suppressed. Rather, we highlight these

passages on lack of evidence for what they reveal about the court's reasoning: the court apparently assumed that display of a sacred text can not speak for itself, and that plaintiff cannot prevail unless he offers *additional* evidence of a religious purpose for displaying the religious message.

B. Alleged Purposes That Did Not Produce Secular Effects

The reasonable observer is well informed, but he is not presumed to know undisclosed intentions. This Court has said only that the reasonable observer "must be deemed aware of the history and context of the *community and forum* in which the religious display appears." *Capitol Square Review & Advisory Board v. Pinette*, 515 U.S. 753, 780 (1995) (O'Connor, J., concurring) (emphasis added). This statement has been quoted or paraphrased, with modest variations to accommodate variations in facts, in *Elk Grove Unified School District v. Newdow*, 124 S. Ct. 2301, 2322 (2004) (O'Connor, J., concurring); *Zelman v. Simmons-Harris*, 536 U.S. 639, 655 (2002); and *Good News Club v. Milford Central School*, 533 U.S. 98, 119 (2001). In these cases, the reasonable observer was presumed to know facts that were openly disclosed and visible to anyone familiar with the dispute: that the government property was open to a wide range of private speakers in *Pinette* and *Milford*; that Ohio awarded tuition vouchers to individual students whose families could choose from a wide range of schools in *Zelman*; and that the Pledge of Allegiance is a patriotic ceremony that has been used in the ways described by the concurring opinion in *Newdow*. But within the context set by "the community and forum," the display speaks for itself. This Court has never assumed that the reasonable observer knows every fact buried somewhere in the public record, however obscure, however undisclosed in practice, and however far removed from the government display or conduct at issue. The Court of Appeals was therefore correct in not finding a secular effect of honoring the Eagles.

The 1961 legislative resolution, reciting a secular *purpose* to honor the Eagles, is irrelevant to secular *effect*.

Nor did the Court of Appeals find a secular effect of fighting juvenile delinquency. The original idea for the Ten Commandments monuments donated by the Eagles was that young people exposed to the Commandments could use them as a code of conduct and thus stay out of trouble. *See Books v. City of Elkhart*, 235 F.3d 292, 294 (7th Cir. 2000). But this hoped-for consequence will come about only if the young people *believe* and act on the message of the Commandments. Fighting juvenile delinquency is of course a secular purpose, but the proposed means -- encouraging juveniles to believe a religious teaching -- is a religious purpose that requires an endorsement of that religious teaching. If government could encourage religion whenever it hoped that more widespread religious faith would lead to secular benefits, it could justify any degree of establishment it chose to pursue.

The argument that encouraging belief in the Commandments might reduce juvenile delinquency is a special case of the last major argument for established churches: that promoting religious faith would tend to produce a more moral and law-abiding citizenry. The founders rejected that argument not on the ground that it was false, but on the ground that it was insufficient to justify establishment. Opponents of establishment agreed that religion is conducive to morality, but they believed that government support for religion was both unnecessary and counterproductive to genuine religious faith.[9] We know, with far more than the usual degree of clarity in historical arguments, that the founders rejected the promotion of good behavior as a justification for establishment.

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[9] These arguments are well summarized in paragraphs 6-8 of James Madison's *Memorial and Remonstrance Against Religious Establishments*, reprinted in *Everson v. Bd. of Educ.*, 330 U.S. 1, 67-68 (1947) (Appendix to opinion of Rutledge, J., dissenting).

C. The Alleged Secular Effect.

The Court of Appeals' discussion of secular effect is a pastiche of disparate and unrelated elements. The Ten Commandments monument is one of seventeen monuments on the Capitol grounds. 351 F.3d at 181. Each monument is freestanding, spread out over twenty-two acres of grounds, *id.* at 175, and the Ten Commandments monument is isolated from the others.[10] The monument is not in any visual relationship to any other monument such that the message of other monuments can affect, much less amend, the message of the Ten Commandments. Nor is there any subject matter relationship between the Ten Commandments and any of the other monuments. More than half the monuments honor military units or larger groups of veterans, and all but two honor classes of people -- soldiers, peace officers, volunteer firefighters, pioneer women, children.

The only monuments to ideas are the Ten Commandments and the Statue of Liberty. There are no monuments to any pair or group of contrasting or related ideas; no monument honors any belief about religion other than the Ten Commandments. There is no effort to explain any relationship between the Ten Commandments and the other monuments, and no such claim would be plausible. There is no monument to anything the legislature has not endorsed. The other sixteen monuments do nothing to modify the message of the Ten Commandments monument; they are essentially irrelevant.

In addition to the sixteen freestanding monuments, there are a variety of portraits, plaques, symbols, and historical displays inside the Capitol itself. One of these is

[10] For a map showing the approximate location of each monument, prepared by the state, see State Preservation Board, *Capitol Grounds and Monuments Guide* (2002), available at http://www.tspb/state.tx.us/SPB/Plan/FloorPlan/pdf/Grounds.pdf. This map also appears in the "Self-Guided Tour," which is in the record and is cited by the Court of Appeals. *See* 351 F.3d at 181 n.20.

a display of six national symbols on the floor of the rotunda, commemorating Six Flags Over Texas, the popular slogan for the history of six independent nations ruling Texas in turn: France, Spain, Mexico, the Republic of Texas, the United States, and the Confederate States (at least de facto). The Seal of Mexico, which is the Mexican component of this display, includes symbols from Aztec mythology. The Court of Appeals tries to portray the Seal of Mexico as an alternate religious display, an Aztec counterpoint to the Ten Commandments. *See* 351 F.3d at 176, 180.

Far from providing context to the Ten Commandments, this display illustrates what is required to actually negate the apparent endorsement inherent in a government display of religious content. It takes no long and attenuated explanation to point out the secular content of the Six Flags display.[11] The Seal of Mexico is naturally integrated, without the need for any conceptual gerrymander or strained explanations. The Six Flags theme is explicit, not implicit; the names of the six nations are spelled out in large letters in the display. A symbol of Mexico is *necessary* to the six-nations message of the overall display. The Seal is a legitimate symbol of Mexico, and in any event, the same symbols from Aztec mythology appear on the Mexican flag. The religious content in the Mexican seal is naturally absorbed into the explicit secular message of the Six Flags display.

The Six Flags display explicitly endorses the truth of the historic claim that six nations have ruled Texas, and implicitly endorses the claim that this history is a unique and romantic fact about Texas, deserving of commemoration at the heart of the Capitol. But it does not endorse every matter incidentally necessary to presentation of the Six Flags

[11] A photograph of this display is available at State Preservation Board, *Online Gallery: Significant Spaces*, available at http://www.tspb.state.tx.us/SPB/gallery/SigSpace/rot.htm. The Seal of Mexico is at the upper left, nearly upside down from the perspective of the camera.

message. The display implies no necessary view about any of the six nations or their chosen symbols. Even if the religious content of the Mexican seal were more easily recognized as religious, and even if it were a symbol of a living faith and not an historic reference to a religion long abandoned, its necessary use to create a Six Flags display would imply nothing about the state's views of the religion.

The Court of Appeals also notes that the state agency responsible for the Capitol grounds employs museum curators to care for the Capitol's historic artifacts and its art collection. 351 F.3d at 180-81. But these curators did not design the Ten Commandments monument, did not determine its content, and in fact have little to do with it. Apparently the only decisions the curators have ever made concerning the monument were to reinstall it and turn it around after construction of the Capitol Extension in 1993. *Id.* at 181. A professional curator who designs a display with an explicit secular message can lend credibility to the claim that religious material was reasonably necessary to the secular message. But here, the curators had no influence on the message of the Ten Commandments monument.

After these various diversions, the Court of Appeals at last concludes that the secular effect of the Ten Commandments monument is based on the role of the Ten Commandments in the development of the "laws of this country." *Id.* The legal significance of the Commandments is supposed to be indicated by the monument's location "on the direct line between" the Capitol and the Supreme Court building. *Id.*

There are multiple problems with this alleged secular effect. But the most fundamental one is that even if this message about legal development were discernable, it would at most be a subtly implied and undeveloped message. It would be overwhelmed by the clear and explicit message of the displayed text of the Ten Commandments. Such a subtle and implicit message cannot negate clear and explicit endorsement. When courts entertain claims that such subtle

and implicit alternate messages negate an explicit and obvious religious message, they invite sham defenses and make every case litigable.

Nothing in the monument's text alludes to either the alleged legal significance of the Commandments or to the alleged significance of their location. The monument is prominently located, very close to the Capitol, and within the broad, irregularly shaped space that can be described as between the Capitol and the Supreme Court. But there is no visible geometric relationship with architectural or symbolic significance. The "direct line" between the Capitol and the Supreme Court exists only in imagination. On the ground, such a line would run diagonally, cutting through hedges and intersecting all the actual streets and sidewalks at odd angles.

Even if there were an explicit statement that the Ten Commandments were significant in the development of American law, that conclusory, overbroad, and contentious statement would not negate the endorsement of the Commandments themselves, as this Court correctly held in *Stone v. Graham*, 449 U.S. 39 (1980). There are multiple reasons for the Court's conclusory assessment of the matter in *Stone*: space, prominence, context, and inaccuracy all contribute to the clear impression that the display in *Stone* was a display of the Commandments, with a comment about the development of law; it was not a display about the development of law, with the Commandments as an illustration. This case is *a fortiori*; here we have a display of the Commandments without even a comment about the development of law.

The text of the Ten Commandments take up far more space than a conclusory statement about their role in legal development, and infinitely more space than an undisplayed statement about their role in legal development. In *Stone*, the Commandments were far more prominent than the explanation, which appeared at the bottom in small print. Here, the Commandments are the only message that appears. Nothing else around the Commandments suggests a display

on the development of American law, either in *Stone* or here. Finally, as elaborated in the next section, the claim that the display of the Commandments is about the development of American law is belied by its inaccuracy.

D. The Ten Commandments Did Not Play A Significant Secular Role in the Development of American Law.

To say that the Ten Commandments exercised "extraordinary influence" on American law, 351 F.3d at 181, is to wrap a kernel of truth in such a vast overstatement as to demonstrate that the statement is a pretext to justify displaying the Commandments. What is plausibly true is that three of the Ten Commandments are an early example of prohibitions on homicide, theft, and false witness (now embodied in the law of perjury and defamation), and that the Commandments have been more visible than other ancient sources because they are part of the sacred text of the dominant religious tradition in Western culture. It is hard to plausibly claim any more than that.

Widely accepted religious teaching provides moral support for corresponding legal prohibitions. But that is a religious effect of the Commandments, akin to the argument that a religious people will be better and more law-abiding citizens. It is not an argument that any existing legal rules are derived from the Commandments.

The provisions of American law do not trace in any significant way to the Ten Commandments. Penalties for murder, theft, perjury, and defamation tend to appear early in the development of all legal systems, including those of ancient civilizations with no reliance on the Jewish scriptures.[12] The American states inherited prohibitions on

[12] *See generally* Russ VerSteeg, *Law in the Ancient World* (Carolina Academic Press 2002). *See id.* at 60-65, 68, 77 (describing homicide, theft, false witness, perjury, and defamation in ancient Mesopotamia); *id.* at 134-35, 165-69, 172-73 (describing perjury, homicide, theft, and

murder, theft, perjury, and defamation from English law. Such rules appear in the earliest surviving sources of English law, the "dooms" of seventh-century Anglo-Saxon kings.[13] These dooms compiled pre-existing customs; the substance of these laws had existed among the Germanic tribes before they were written down and before the Anglo-Saxons were Christianized.[14] The American law of murder, theft, perjury, and defamation thus traces back through centuries of English law to the barbarian laws of non-Christian Germanic tribes -- and this line of development is far more direct than any development from the Ten Commandments. The comprehensive standard sources -- Holdsworth,

defamation in ancient Egypt); *id.* at 216-17, 243-48, 254-55 (describing perjury, homicide, and theft offenses in ancient Athens); *id.* at 299, 334-37, 345-46, 347 (describing perjury, homicide, theft, and elements of defamation in pre-Christian Roman law).

[13] *See* Carl Stephenson & Frederick George Marcham, eds., *Sources of English Constitutional History* 1-10 (Harper & Rowe 1937) (reprinting excerpts from the dooms). There are many provisions penalizing homicide and theft; for perjury and defamation, *see id.* at 5 (Dooms of Hlothaere and Eadric ¶11). For analysis, see Frederick Pollock & Frederick William Maitland, 1 *The History of English Law Before the Time of Edward I* 52-53, 55-56 (2d ed., Cambridge Univ. Press, 1968) (Anglo-Saxon law of homicide and theft); 2 *id.* at 537 (Anglo-Saxon law of defamation); 1 *id.* at 39-40 (describing heavy reliance on oaths in Anglo-Saxon law); William Holdsworth, 2 *A History of English Law* 105 (4th ed., Methuen & Co., 1936) (Anglo-Saxon penalties for false accusations); Theodore F.T. Plucknett, *A Concise History of the Common Law* 483 (5th ed., Little Brown, 1956) (Anglo-Saxon law of slander).

[14] *See* Holdsworth at 19 (stating that Anglo-Saxon codes, which is what he calls the dooms, "enacted the customary law of the tribe"); 1 Pollock & Maitland at 44 ("in its general features, Anglo-Saxon law is not only archaic, but offers an especially pure type of Germanic archaism"). This Anglo-Saxon base persisted in English law after the Conquest. Pollock & Maitland conclude that "our laws have been formed in the main from a stock of Teutonic customs, with some additions of matter, and considerable additions or modifications of form received directly or indirectly from the Roman system." *Id.* at c.

Plucknett, and Pollock & Maitland -- have no index entries for the Ten Commandments, and in extensive reading on early English law in those sources, counsel has encountered not a single mention of the Ten Commandments.

Of course the Christianization of England contributed ideas that influenced law. But these ideas were nothing so basic as the points of overlap between secular law and the Ten Commandments. Holdsworth emphasizes the church's contribution of more advanced legal ideas derived from secular Roman law, not from religious faith.[15] The idea of writing down tribal laws and customs was itself one of these Roman ideas; thus the dooms first appear after conversion to Christianity.[16] Plucknett attributes to the influence of Christianity and its Jewish inheritance the concept of individual responsibility, holding individuals rather than families responsible for wrongdoing.[17] But the basic ideas that it was wrong to kill, steal, or bear false witness were known to the Anglo-Saxons before the Ten Commandments.

The Commandment forbidding adultery corresponds to legal rules that survive in American law only vestigially. Adultery is a ground for divorce that is rarely used in the age of no-fault divorce, and in a few states, it is still a crime, frequently committed but rarely prosecuted. Many Americans, including these amici, believe adultery to be immoral and destructive. But few Americans want any serious effort to criminally prosecute adulterers. The Commandment against adultery has thus become a religious and moral obligation with little remaining relationship to law. And at any rate, adultery too was prohibited in many early legal systems unrelated to the Ten Commandments, including that of the Anglo-Saxons.[18]

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[15] *See* 2 Holdsworth at 21-25.

[16] *See* 1 Pollock & Maitland at 11-12.

[17] *See* Plucknett at 8-9.

[18] *See* 2 Pollock & Maitland at 392-93, 543-44 & n.1; 2 Holdsworth

The Commandments against coveting, and the Commandment to honor one's father and mother, are religious and moral obligations that have never been legal obligations in Anglo-American law. The remaining Commandments, and the promise of divine reward for honoring one's father and mother, could not constitutionally be part of American law. These are purely religious teachings, concerning each person's relationship to God.

In sum, only three of the Commandments are a significant part of American law, and those three provisions were part of the law of England before England learned of the Commandments. Why would the state pick out this single text, with at best a loose and ill-fitting relationship to the law, to illustrate the development of American law? Of course it would not. The state displayed this text for its religious significance, not for its legal significance.

The state clearly intended to endorse the Commandments, but its rationalizations have a mixed and somewhat contrary effect. By attributing to the Commandments a legal significance they do not have, the state inflates the importance of the Commandments to citizens who do not believe in either Christianity or Judaism. But by emphasizing this false source of significance, the state necessarily distorts and conceals the Commandments' true significance in the faiths to which they are sacred. The claim that the Commandments are a source of American law, like other attempts to secularize the Commandments, tends to minimize the religious and moral obligations set forth in the Commandments. Caught in an obvious attempt to promote a sacred text, and spinning secular rationalizations for its conduct, the state manages both to advance and inhibit religion at the same time -- to advance one understanding of the sacred text, and thereby to inhibit another, more religious understanding of that text.

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at 90.

III. The Court Can Specify the Kinds of Evidence Required to Rebut the Presumption that Government Endorses Any Text That It Displays.

A. A Sacred Text May Be Part of an Explicit Secular Message That Is Objectively Neutral with Respect to the Content of Sacred Text.

A sacred text may be an integral part of a secular message or display. We have already considered this possibility with respect to the Aztec symbols on the Seal of Mexico in the Six Flags display. In this section, we briefly consider that possible line of rebuttal more generally.

Consider how the Ten Commandments would be presented in a secular museum display designed by a professional curator, or in a curricular unit designed by a professional teacher -- assuming neither was committed to evading the state's obligations under the Establishment Clause, nor obliged to superiors demanding such evasion. In such a context, the Commandments would not be presented by themselves. They would be an integral part of some larger pattern, and the larger display or curricular unit would convey information in no way dependent on whether observers or students believed the Commandments. Such a display might survey ancient moral codes, or lawgivers through history. It might be a comparative survey of the world's great religions. It might be part of a history of the Jewish people. It might be many things, but it would not be a bare display of the sacred text. Other texts or objects would be included, and there would be explicit explanations of the relationship among the various items included. There would be a coherent pattern to the combination, not dependent on the religious significance of the sacred text.

Neither lawyers nor expert witnesses would be needed to explain the secular point of such a display, because the whole display would be designed to convey its secular point. The secular point would be open and obvious,

and the sacred text would be a natural component, necessary to the display.

Justice O'Connor said in *Lynch v. Donnelly*, 465 U.S. 668 (1984), that "a typical museum setting, though not neutralizing the religious content of a religious painting, negates any message of endorsement of that content." *Id.* at 692 (concurring opinion). This is no doubt true, but why? It is true because the museum context makes clear that the painting is there because of its value as art, not because of its religious message. This is clear because there are many other paintings, because all of them have substantial value as art, and usually, because not all of them are religious. But even in a museum devoted to a period where substantially all art was religious, the reasonable observer could see that selections were based on artistic value.

Similarly in the case of a display or curricular unit conveying secular information, the reasonable observer can see that the sacred text was selected because it is necessary to the secular message, or at least that it was highly relevant and naturally illustrative or supportive of the secular message. But when the sacred text is displayed by itself, the reasonable observer can see only the sacred text and the state's desire to promulgate it.

This Court should adopt this model for justification of state display of a sacred text. Where the state claims that it is really using the sacred text to promulgate some secular message, that secular message must be explicit, it must dominate any religious implications of the display, and the sacred text must be an integral component, clearly necessary or at least highly relevant, to the explicit secular message of the display. The government must carry the burden of rebutting the presumption that it endorses what it displays.

It should be obvious that not every display that combines religious and secular elements will meet this standard. Such a display might simply endorse all its disparate elements, or it might be gerrymandered to include a marginally relevant sacred text, or its message might

depend upon a claim about the truth of the sacred text. The proposed presumption will not make every case easy. But it will make many cases easy, on both sides of the line. By holding governmental units to an objective standard, much sham litigation will be avoided, and this Court will no longer invite governmental units to desacralize sacred texts.

B. Government May Use Religious Language in *De Minimis* Ways for Secular Purposes.

In *Elk Grove Unified School District v. Newdow*, 124 S. Ct. 2301 (2004), Justice O'Connor suggested a ceremonial deism exception, in which government uses very brief and generic religious statements for essentially secular purposes. We believe such uses of religious language might better have been described as religious but legally *de minimis*; these statements carry serious religious meaning for many Americans and are not mere religious forms with secular meanings. But however these ceremonial formulations are characterized, their use by government is very common. Justice O'Connor's contribution in *Newdow* was to propose a workable and reasonably objective test for distinguishing these ceremonial uses of religious propositions from more substantial uses that are clearly unconstitutional.

These amici assume that a government that displays a sacred text may rebut the presumption of endorsement by showing that the display satisfies Justice O'Connor's test in *Newdow*. But textual displays of the Ten Commandments plainly do not satisfy that proposed test.

Justice O'Connor's first factor is "History and Ubiquity." *Id.* at 2323. A finding of secular purpose requires "a shared understanding" of that purpose, and this "can exist only when a given practice has been in place for a significant portion of the Nation's history, and when it is observed by enough persons that it can fairly be called ubiquitous." *Id.* There is no ubiquitous history of large monuments displaying the text of the Commandments. The Pledge of Allegiance is recited every day in every classroom

in nearly every school in America. Only a very small percentage of American towns have large government-sponsored monuments to the Ten Commandments, and even in those towns, most citizens encounter the monuments only occasionally. Petitioner's reliance on the state law library brought him regularly to the Capitol complex, but citizens of Austin without frequent business at the Capitol may encounter the Ten Commandments monument rarely or not at all. The "Ten Commandments" is well known as a phrase and a concept, but no version of the text is well known. The text is religiously important, but it is not routinely recited even within places of worship, and certainly not elsewhere. The reasonable observer is not familiar with the text, but more to the point here, the reasonable observer is not familiar with any ubiquitous secular use of the text.

Justice O'Connor's second factor is "Absence of worship or prayer." *Id.* at 2324. Passive display of the Commandments is not an act of worship or prayer and does not explicitly call for such an act from viewers. But for those who take the Commandments seriously, the Commandments inspire awe at the majesty of God and His Commandments. Reading the Commandments anew inspires an attitude of worship in many believers.

Justice O'Connor's third factor is "Absence of reference to particular religion." *Id.* at 2325. The Commandments do not satisfy this factor; they are from a specific religious tradition. "Thou shalt have no other gods before me" is unambiguously a claim of religious exclusivity. The God making this demand is not explicitly identified in Texas's display of the Commandments, but that missing fact is widely known among reasonable observers. Many observers who know little or nothing about the content of the Commandments will know, when presented with the Commandments, that they come from the Jewish or Christian scriptures. And the monument's reference to "the land which the Lord thy God giveth thee" is of course a reference to God's promise of the land of Israel to the Jewish people.

It is the Jewish and Christian God that claims priority over all other purported gods on Texas's Ten Commandments monument, and the state cannot endorse such a particularistic religious claim. Even among Christians and Jews, there are significant differences in presentation and interpretation of the Commandments, and as Petitioner points out, Texas has taken sides in those disputes.

Justice O'Connor's fourth factor is "Minimal religious content." *Id* at 2326. The two religious words in the Pledge were sufficiently minimal; the "repeated thanks to God and requests for blessings" in the prayers in *Lee v. Weisman*, 505 U.S. 577 (1992), were not. *Newdow*, 124 S. Ct. at 2326 (O'Connor, J., concurring). Brevity "tends to confirm" secular purpose, it limits government's ability "to express a preference for one religious sect over another," and in oral ceremonies, brevity makes it easier for dissenters to "opt out" at the religious passage. *Id.*

The Commandments have substantial religious content; Texas's version is 120 words, slightly longer than the benediction in *Weisman* (114 words). Even if the Second Table is excluded on the ground that those Commandments have secular equivalents -- and we have already stated our objection to treating any of the Commandments as merely secular -- the Texas monument devotes 66 words to the explicitly religious content of the First Table. Either way, this is substantial religious content, too long to serve any of the purposes attributed to religious brevity. Displaying the entire text of the Commandments confirms a religious purpose to endorse the Commandments, not a ceremonial secular purpose. There are ample words to "express a preference for one religious sect over another," and far too many words for anyone to comfortably opt out if the monument's text were to be read aloud. To say that the Commandments have "minimal religious content" is to attempt to desacralize the Commandments.

C. The State May Use Brief Quotations from Religious Sources with Meanings Equivalent to Secular Sentiments.

"That they may truly and impartially administer justice" is engraved over the original main entrance of The University of Texas Law School. The source is not attributed, and the phrase is an entirely appropriate sentiment for a secular law school. But the phrase is taken from the Book of Common Prayer and thus was originally part of the prescribed prayer for the King's ministers by members of an established church.

Despite its religious origin, the phrase has no explicitly religious content, and its meaning is entirely appropriate to its context. We think it is objectively apparent that the Law School's use of this phrase does not endorse its religious origins, or any religious meaning; rather, it borrows an eloquent formulation of an idea that could be either secular or religious.

A somewhat more troubling example of the same category appears high up on the Tower, the University's Main Hall: "Ye shall know the truth and the truth shall make you free." This is borrowed from the *Gospel of John*, 8:32, again without attribution. In this example, the meaning has been changed. In *John*, the sentence refers to the truth of Jesus Christ; at the University, it refers to the temporal truths to be discovered through research and study. In the University's use, it is an eloquent formulation of a secular idea central to the mission of the University. And it has no explicitly religious content; its literal meaning is fully consistent with an entirely secular reading and fully consistent with the University's usage.

This usage is slightly troubling because the University's usage tends to obscure the religious meaning of the sacred text. But precisely because the University so clearly changes the meaning, and so entirely removes the quotation from its religious context, the unattributed quotation has little tendency either to endorse the original

religious meaning or to distort the religious meaning of the same words when encountered in their religious context. The University takes no position, one way or the other, on the religious proposition in the original meaning.

Such secular quotations from religious sources have not been litigated. We briefly note them here simply to show that they are fully consistent with the proposed presumption. A government that displays a sacred text must be presumed to endorse that text. This presumption is rebuttable only by objective evidence, clearly visible at the site of the display, that negates any appearance of endorsing the religious sentiment and gives the entire display a secular meaning that dominates any religious meaning. Brief quotations with no explicitly religious content, used in contexts that are plainly appropriate to their secular interpretation, satisfy that standard.

CONCLUSION

The judgment should be reversed and the case remanded with instructions to order that the monument be removed from state property and from state ownership.

Respectfully submitted,

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